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March 19, 2004

EX PARTE

Ms Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S W.  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Docket No. 96-115

In the Matter of Implementation of the Telecommunications Act of 1996,  
Telecommunications Carriers' Use of Customer Proprietary Network Information and  
Other Customer Information

Dear Ms. Dortch.

The Yellow Pages Integrated Media Association ("YPIMA", formerly the Yellow Pages Publishers Association) is filing this ex parte to respond to the March 4, 2004 and December 9, 2003 ex partes filed by the Association of Directory Publishers (ADP). YPIMA believes that ADP's filing does not accurately characterize the directory publishing industry and the process by which publishers obtain directory listings

In its December 9, 2003 ex parte, ADP cites Commission precedent in directory assistance proceedings as a reason to impose additional obligations on incumbent local exchange carriers (ILECs) or their publishing affiliates. The Commission has, rightfully so, continued to keep directory publishing and directory assistance separate. In CC Docket 99-273, the Commission asked whether the lines between directory assistance and directory publishing have blurred so much as to make those distinctions moot. The Commission wrote, "We conclude, however, that any seeming convergence between directory publishing and directory assistance does not obviate the statutory distinction drawn by Congress concerning these two services. In addition to the technical distinctions between the two types of services, we agree that directory publishing has been a competitive business for years, while directory assistance is just now becoming a competitive service. These differences are significant because they explain the differing regulatory classifications drawn by Congress for directory assistance and directory publications. We thus conclude that the statutory differences between directory assistance and directory publishing should continue to be observed."<sup>1</sup> (Footnotes omitted). We concur and

<sup>1</sup> Provision of Directory Listing Information under the Telecommunications Act of 1934, as Amended, CC Docket No. 99-273, First Report and Order, at para 49 (rel. January 23, 2001)

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assert that nothing has changed in the time since the Commission's decision in CC Docket 99-273 to require the Commission to now impose directory assistance regulations on the directory publishing industry.

The language Congress chose to use to unambiguously require carriers to include directory assistance listings in their inter-carrier transactions appears within the context of interconnection agreements and is clearly only available to providers of telephone exchange and toll service.<sup>2</sup> Had Congress wished to impose a comparable obligation regarding the transference of SLI to non-carriers, it would have done so using similar language. But it did not, and thus a different Congressional intent is demonstrated.

Historically, directory assistance has been considered adjunct to telephone service. In contrast, published directories are not an adjunct to telephone service. Any telephone subscriber, regardless of their telephone exchange provider can choose which telephone directory they use. As noted above, directory publishing has been a competitive industry for years.

ADP fails to acknowledge that the rapidly changing world of telecommunications has created challenges for all directory publishers. As competitive local exchange carriers (CLECs), wireless alternatives, and VoIP attain an ever-growing share of the telecommunications marketplace, no single source has all the listing information formerly in the possession of the ILEC. YPIMA member publishers have to work hard at getting complete, accurate, and up-to-date information from CLECs and other telecommunications providers. It is no more convenient for an affiliated publisher to get this information than an unaffiliated publisher. And under the law and subsequent commission regulations, once a CLEC has made that information available to an ILEC-affiliated directory publisher, it must also do so for other independent publishers in a non-discriminatory manner. Thus, the raw material for producing directories is available to all competitors, who then must each decide how their unique competitive strategy will best make use of that information.

ADP asserts that CLECs do not generally maintain SLI databases. Whether or not a CLEC maintains an SLI database does not relieve the CLEC of its section 222(e) obligation to provide SLI to all directory publishers in a non-discriminatory manner. Simply because a CLEC does not wish to or is unable to comply with an SLI request is no reason to impose an additional obligation on the ILEC or its affiliated publisher. The answer is to file a complaint against the CLEC and force them to provide SLI to a publisher, not to impose additional rules and obligations on other carriers for the CLEC's inability or unwillingness to comply with the rules.

ADP also mischaracterizes how ILEC-affiliated publishers obtain listings from CLECs. ILEC-affiliated publishers frequently contract directly with the CLECs, securing the CLECs' authorization to include the CLECs' listings in their directories. Publishers have adopted this strategy to secure complete and accurate information for their directory products. As part of the contractual relationship, the ILEC-affiliated publishers may offer a number of different services and support functions to the CLECs for the purpose of securing directory listing information from the CLECs. While each publisher offers different support services, the range of services includes:

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<sup>2</sup> 47 U.S.C. § 251(b)(3).

- Accepting listing changes faxed from the CLEC that have to be manually processed.
- Providing PC software that can be used to format and submit listing information from the CLEC to the publisher.
- Online reference materials to assist with the formatting and submission of listing information.
- Yellow Pages verification reports that allow the CLEC to validate that the listing has been received by the publisher and the primary heading that is currently assigned to the listing.
- Online and telephone hot line access to address listing problems encountered by the CLECs.

The publishers may also make commitments to the CLECs as an incentive to enter these relationships. Contractual obligations may be established with regard to publishing CLEC listings, as well as, performing initial and secondary delivery to CLEC subscribers.

YPIMA members face the same challenges as the members of ADP when attempting to contact CLECs and other ILECs within their local publishing area in for the purpose of creating as complete a directory as possible. ADP's assertion that ILEC-affiliated publishers do not have to endure a costly and time consuming process to obtain complete and accurate CLEC and other non-carrier listings is simply not true. In fact, YPIMA member publishers spend considerable resources obtaining as complete a set of listings as possible. That is why YPIMA maintains a database of CLECs (by state) and contact information on our website.<sup>3</sup> Even YPIMA's website acknowledges the changes that competition has brought to the directory publishing industry. "With the deregulation of the telephone industry, thousands of Local Exchange Carriers (LECs) have emerged. These companies have purchased blocks of numbers from various telephone companies for resale of telephone services. Yellow Pages I.M.A.<sub>SM</sub> Publisher members and Competitive Local Exchange Carriers (CLECs) have provided the following list of CLEC contacts across the United States. It is as accurate and all encompassing as possible based on the data provided to date."<sup>4</sup>

Another issue is the liability for incorrect information. Hypothetically, if an ILEC provided an unaffiliated publisher with CLEC information, and that CLEC information was inaccurate, or included non-published numbers, there could be significant consequences. Adding the ILEC as a third-party to the listing provisioning process creates additional opportunity for errors, confusion as to who is liable when errors occur, adds administrative costs for the ILECs, and creates economic risk for the ILEC for which the ILEC is not compensated. Each carrier should take the responsibility for providing accurate, up-to-date listing information. The best way for a publisher ensure that the information is as accurate and up-to-date as possible is to get it directly from the carrier.

ADP appears to want to ride on the coattails of the work done by the affiliated publishers. The affiliated publishers have incurred significant expense in obtaining, maintaining, scrubbing,

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<sup>3</sup> [http://www.ypima.org/products\\_services/clec.cfm](http://www.ypima.org/products_services/clec.cfm). This portion of the website is open to the public. Anyone can access this

<sup>4</sup> YPIMA's website at [http://www.ypima.org/products\\_services/clec.cfm](http://www.ypima.org/products_services/clec.cfm).

updating and formatting listing information. Essentially, ADP would like to obtain this information at the low rates established by the FCC. Imposing such a requirement would be confiscatory in nature, and would not likely survive judicial scrutiny. If any carrier is not providing its own subscriber listing information to an ADP member, or any other publisher, the publisher should be filing a complaint with the Commission, rather than attempting to impose an obligation on the ILECs to provide the listing information of another carrier.

A requirement to provide another carrier's listing to publishers is outside of the statute and Congressional intent. ADP's request ignores the plain words of the statute. Subscriber listing information is defined as information "identifying the listed names of subscribers of a carrier..."<sup>5</sup> Indeed, the statute requires that telecommunications carriers need only provide the listing information of their own subscribers.

The creation of an SLI clearinghouse will likely be an expensive and difficult process. The Commission should not impose such a requirement on ILECs, especially when the FCC has set the price for the data at a relatively low price point that does not reflect the added costs that would be created for the ILECs. To do so would be illogical, harmful, contrary to Commission precedent, and outside the Commission's statutory authority.

ADP raises several other important matters in its March 4, 2004 ex parte, of which YPIMA will comment here on only three. Regarding the ability to deny an entity SLI if the carrier has a reason to believe that the SLI is being used for purposes other than directory publishing, YPIMA believes a reasonable compromise is available. YPIMA's main concern here is the protection of subscriber's privacy. To the extent that a carrier cannot object to the sale of SLI to anyone until after the sale has occurred leaves the SLI database totally vulnerable to misuse. YPIMA suggests that any directory publisher that has obtained SLI in the recent past is presumed to be using SLI to publish a directory. If the carrier believes that the information is being misused by an entity that has previously used SLI to publish a directory, the onus will be on the carrier to file a complaint at the FCC and prove that the information is being misused. In those cases, the carrier should be required to continue to provide SLI to that publisher until the FCC makes a determination otherwise. If, however, the entity has never purchased SLI from the carrier before, and the carrier has a good faith belief that the SLI will be used for something other than publishing a directory, the carrier can refuse to sell the SLI to that entity. The entity will have the onus to file a complaint at the FCC to show that the entity is, indeed, using that information to publish directories. That way, legitimate directory publishers can be assured of continued access to SLI, while carriers can prevent misuse of SLI.

Regarding the public availability of contracts between an ILEC and its directory publishing affiliate, YPIMA continues to vehemently object to this provision. Contracts between a carrier and its publisher are proprietary, much like any other vendor contract. YPIMA suggests that instead of making these contracts publicly available, during a complaint proceeding, the FCC can request an in-camera review of any relevant contract. That way the proprietary information remains proprietary and the FCC can determine whether or not the carrier is discriminating between affiliated and non-affiliated publishers.

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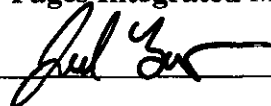
<sup>5</sup> 47 U.S.C. 222(f)(3)(A) (emphasis added)

For directory delivery information, it is clear from the statute that non-published information is not SLI. SLI is information "that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format."<sup>6</sup> Clearly, information relating to unlisted and unpublished subscribers is not SLI. Congress carved out this information for the protection of those who do not wish for their SLI to be shared. With the continued Balkanization of the local exchange telephone business, directory publishers (affiliated and non-affiliated) have turned to alternative sources for directory delivery. Tax records and water and electric utility subscriber information are far more comprehensive and reliable for delivery purposes. In light of these changes to the local telephone industry, publishers are moving toward saturation delivery instead of targeted directory delivery only to telephone subscribers. Clearly, delivery information is not required for publishing a directory. Seeing as there are many other ways to obtain this information or to successfully deliver directories, the possible harm of unlisted and unpublished SLI being shared with any entity is far outweighed by the slight convenience of obtaining that information for directory delivery.

YPIMA respectfully requests that the Commission not impose any addition extra-statutory obligations on carriers or carrier affiliate-publishers. The courts have been very stern with the Commission when it has gone beyond Congressional intent. These new obligations requested by ADP, especially the requirement to act as a clearinghouse for CLEC listings, would impose significant and unnecessary burdens on carriers and their affiliated publishers, and is clearly not supported by the statute or Commission precedent. YPIMA believes there is room for compromise on several other issues and is willing to discuss any potential solutions with the FCC staff.

Respectfully submitted,  
**Yellow Pages Integrated Media Association**

By \_\_\_\_\_



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<sup>6</sup> 47 U.S.C. 222(f)(3)(B)

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20580

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

**YELLOW PAGES INTEGRATED MEDIA ASSOCIATION**  
**SUPPLEMENTAL COMMENTS**

The Yellow Pages Integrated Media Association ("YPIMA")<sup>1</sup> files these supplemental comments in the above captioned proceeding. Specifically, YPIMA has asked its member companies to attempt to quantify the cost of complying with the changes to the Commission's do-not-fax rules which require written permission before sending a facsimile, even when there is an existing business relationship with the recipient.<sup>2</sup>

We believe the Commission has underestimated the significant cost businesses will have to assume to comply with the law. Indeed, the Report and Order in this proceeding states "We believe that even small businesses may easily obtain permission from existing customers who agree to receive faxed advertising..."<sup>3</sup>

Compliance with the new requirement of written permission takes more than walking into a place of business and asking the owner to sign a simple sheet of paper. Directory publishing is a large and complicated business, relying on personal contacts with millions of advertisers. YPIMA's

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<sup>1</sup> The Yellow Pages Integrated Media Association, formerly the Yellow Pages Publishers Association, is a global trade association based in Berkeley Heights, New Jersey, representing the Yellow Pages industry, both print and electronic. YPIMA member companies include publishers (of both Yellow and White Pages) and other businesses associated with the Yellow Pages industry.

<sup>2</sup> The data in these supplemental comments comes from large publishers, and is representative of the industry as a whole. Smaller publishers may have significantly different costs. YPIMA's smaller publishers were unable to respond to the association's request for information due, in part, to the inability to spend the time necessary to make these calculations. The impact of these rule changes will surely disproportionately harm smaller publishers.

<sup>3</sup> *Report and Order In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket 02-278, at para 191

latest figures show that there are approximately 3.4 million unique advertisers in the Yellow Pages in the United States, the vast majority of which are small businesses.<sup>4</sup> Some directory companies have more than half a million advertisers. Many state tariffs require telephone companies to provide each business subscriber with a complimentary Yellow Pages listing.<sup>5</sup> Each customer must be contacted directly, have the do-not-fax rules explained, and be sent or delivered a fax consent form.<sup>6</sup> While directory publishers will not communicate with every advertiser by fax, many will be sent faxes with advertising rates, ad mock-ups, sales specials, and other customer-specific information that could be classified as an unsolicited commercial facsimile under the current rules. Indeed, because of the nature of the business and because directory advertising in general is a visual medium, faxes are an extremely effective method for communicating with advertisers. Prudent publishers will obtain consent-to-fax forms from every actual and potential advertiser.

Each directory salesperson must be trained in the do-not-fax rules. A database must be created to determine which advertisers permit faxes and which do not. Each time an advertiser is contacted, the database must be consulted and updated. For purposes of calculating a cost to the industry, YPIMA is using a very conservative figure of one half hour of aggregate time for employees involved in obtaining written permission to fax materials to an advertiser or potential advertiser.<sup>7</sup> This includes training, the multiple sales contacts to obtain the consent, updating computer files, maintaining paper files, etc. This does not count the time the legal department will have to spend drafting do-not-fax releases, rewriting contracts, and answering complaints regarding alleged violations of the new written permission requirement.

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<sup>4</sup> Based on 2002 CRM data

<sup>5</sup> Publishers will contact these subscribers to ensure that their complimentary listing is accurate and placed correctly in the book. It is often much more efficient to verify listings by fax so that the subscriber can visually confirm that the listing is accurate and appears in the exact way the subscriber wants. As with any publishing or printing business, the customer needs to see the proof before approving for publication.

<sup>6</sup> Or instructed how to otherwise signify written consent.

<sup>7</sup> The actual time could be significantly more. For some sales contacts, it may take multiple calls or even a premise visit to obtain the written permission. For others, it may be accomplished with a single phone call.

In attempting to quantify what this means to the industry, companies have calculated a weighted average per hour salary for the various types of employees that could be involved in obtaining fax permission and maintaining a database of those who have given permission to be contacted by fax. Those employees include sales representatives, sales support, clerical, and customer service.<sup>8</sup> The response from YPIMA's member companies for the weighted average for those employees ranges from approximately \$29.00 per hour to \$34.00 per hour.

As noted above, YPIMA's member companies believe that it will take at least one half hour on average per advertiser to obtain an initial written consent. This includes, but is not limited to, training, working with the advertiser to understand the consent, obtaining the consent, filing the consent, cataloguing the consent, and referring to the consent forms prior to sending a fax.

Currently, there are approximately 3.4 million unique Yellow Pages advertisers. The total cost figure, however, must include those potential advertisers for which there have been discussions about advertising in the directory, but did not actually purchase an ad this time around. A very conservative estimate is that 25% of the customer contacts do not result in a purchased advertisement in any given year. The actual numbers may be higher, estimated to be as high as 40%. Assuming the conservative 25% non-close rate, this means there are an additional 850,000 contacts that must consent to having a fax sent to them. For the industry, that equals 4,250,000 consent forms. Using the higher 40% non-close rate, an additional 1,360,000 contacts (above the 3,400,000 actual advertisers) must have consent forms sent to them, for a total of 4,760,000 consent forms.

Taking the conservative figure of one half hour per consent and the conservative figure of 4,250,000 contacts, each requiring a consent-to-fax form, based on the lower cost average figure of \$29.00, the low-end estimate of the cost to the entire industry in employee time is \$61,625,000.

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<sup>8</sup> Again, YPIMA has not attempted to quantify the legal expenses involved in this effort



Using the higher estimates of \$34.00 an hour, and 4,760,000 contacts requiring consent forms, the cost to the industry for employee time could reach as high as \$80,920,000.

These cost estimates do not include any upgrades and software changes to the information technology and database programs currently in use. These upgrades could run into the millions of dollars for individual directory publishers. In addition, one company estimated that one additional sheet of paper added to every sales package will cost \$0.07. That includes copying, faxing or mailing, and storage. Based on 4,250,000 contacts, that will increase costs by \$297,500, or \$333,200 for 4,760,000 contacts. This calculates only the economic costs, and not the attendant environmental costs. Assuming that the advertiser keeps a copy of the consent, the sales representative keeps a copy, and one is archived for the company, this new rule change could require an additional 13,000,000 pieces of paper to be used. In an era when directory companies are making significant strides to reduce paper consumption,<sup>9</sup> these rule changes run directly contrary to the industry's environmental conservation efforts.

Under the old rules, publishers would not be required to obtain written consent from these advertising customers, as the established business relationship created an implied permission. If directory publishers are required to obtain permission from each actual and potential advertiser, it could cost the industry nearly one hundred million dollars. Needless to say, such a burden on the industry is intolerable, and would cause considerable hardship.

The data presented in this filing represents the enormity of the task facing YPIMA's members. The Commission must recognize that this is a significant investment of time and money. As the Commission noted when it extended the deadline for compliance for do-not-fax, that it will take time, and consequently considerable resources, to comply with the do-not-fax changes. Given the significance of the task described herein, and the number of petitions pending, companies are

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<sup>9</sup> For example, directory publishers are using thinner paper and different fonts in an effort to use less paper

understandably reluctant to spend the extraordinary resources that will be necessary to comply with the written permission requirement until it is clear that they must. We implore the Commission to act expeditiously in considering YPIMA's and other petitions for reconsideration. If the Commission is to deny these petitions, we ask that the Commission ensure that the industry has at least six months to put into place the necessary systems, processes and training to comply with these new rule changes.

YPIMA again respectfully requests that the Commission reinstate the established business relationship exemption for its do-not-fax rules. YPIMA again respectfully requests that the Commission clarify that facsimiles containing information pertaining to a product or service previously purchased or obtained by a customer in the past three years are not considered unsolicited facsimile advertisements. In addition, YPIMA respectfully requests that the Commission clarify that transaction-specific facsimiles are not considered unsolicited facsimile advertisements. Should the Commission adopt the proposed changes discussed above, the economic impact of the new do-not-fax rules will be a fraction of what it would otherwise cost the directory publishing industry.

Respectfully submitted,

**Yellow Pages Integrated Media Association**

By  \_\_\_\_\_

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